

OSHD Docket No. 7547  
OSHI ID/Report No. R2703 014-03  
OAH Docket No. 11-1901-15677-2

**STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE DEPARTMENT OF LABOR AND INDUSTRY**

M. Scott Brener, Commissioner  
of the Minnesota Department of  
Labor and Industry,

Complainant,

vs.

Mike Gephart, Jr.,  
d/b/a Wood Doctors,

Respondent.

**ORDER DISMISSING NOTICE OF  
CONTEST AND AFFIRMING  
CITATION AND PENALTIES**

This matter is pending before Administrative Law Judge Barbara L. Neilson pursuant to the motion of the Complainant, M. Scott Brener, the Commissioner of the Minnesota Department of Labor and Industry, for an Order dismissing the Notice of Contest and Service to Affected Employees ("Notice of Contest") filed by the Respondent Mike Gephart, Jr., doing business as Wood Doctors, due to the Respondent's failure to file an Answer to the Complaint. The OAH record remained open until January 15, 2004, for the submission of a response to the motion by the Respondent.

Omar A. Syed, Assistant Attorney General, 445 Minnesota Street, Suite 900, St. Paul, MN 55101, appeared on behalf of the Complainant. There was no appearance filed by or on behalf of the Respondent, Mike Gephart, Jr., d/b/a Wood Doctors, Inc., 18447 El Dorado Way, Farmington, MN 55024.

On May 3, 2003, the Respondent received a Citation and Notification of Penalty for violation of Minn. Stat. § 182.653, subd. 8 (no penalty specified); 29 C.F.R. § 1926.501(b)(13) and (15) (penalty of \$1,050.00 specified); and 29 C.F.R. § 1926.503(a)(1) and (2) (penalty of \$1,050.00 specified).<sup>[1]</sup> The Complainant filed a Notice of Contest and Service to Affected Employees on May 17, 2003.<sup>[2]</sup> On August 5, 2003, the Complainant served a Summons and Notice to Respondent and a Complaint on the Respondent by U.S. Mail.<sup>[3]</sup> The first paragraph of the Summons stated:

YOU ARE HEREBY SUMMONED and required to serve upon the Commissioner, Department of Labor and Industry, Legal Services Division, 443 Lafayette Road, St. Paul, Minnesota 55155, an Answer to the attached Complaint within twenty (20) days after service of this Summons upon you, exclusive of the day of service. In the Answer you shall admit or deny each allegation of the Complaint and shall set forth any matter constituting an affirmative defense to those allegations. Failure to raise such affirmative defenses in your Answer may bar you from raising them subsequently in these proceedings. Failure to file an Answer may constitute a waiver of your right to further participation in these proceedings.<sup>[4]</sup>

Counsel for the Complainant sent the Respondent letters on August 14, 2003, and December 17, 2003, reminding the Respondent of its obligation to serve an Answer.<sup>[5]</sup> The December 17, 2003, letter notified the Respondent that, if counsel for the Complainant had not received the Respondent's Answer by December 29, 2003, the Complainant would ask the Administrative Law Judge to dismiss the Notice of Contest and affirm the citations in their entirety.<sup>[6]</sup> Despite these reminders and warnings, the Respondent has never served or filed an Answer to the Summons and Complaint, as required by law<sup>[7]</sup> and as specified in those documents.<sup>[8]</sup> The Occupational Safety and Health Review Board<sup>[9]</sup> and other Administrative Law Judges<sup>[10]</sup> have previously dismissed notices of contest and affirmed OSHA citations where companies have failed to serve answers.

On December 31, 2003, the Complainant filed a Motion to Dismiss Respondent's Notice of Contest based on the Respondent's failure to file an Answer in this proceeding. The Notice of that motion, which was served upon the Respondent, expressly stated that, "[i]f you wish to contest this motion, you must file a written response with the judge and serve copies on all parties within ten (10) days after you receive this motion." Minnesota Rules part 1400.6600 requires parties to file and serve responses to motions "within ten working days after it is received." The Respondent has not filed and served a response to the Complainant's motion within the time specified by law.

### **ORDER**

Based upon the record in this proceeding, the Administrative Law Judge hereby ORDERS:

(1) That the Complainant's Motion to Dismiss is GRANTED and the Notice of Contest of the Respondent is DISMISSED;

(2) That the Citation and Notification of Penalty for Respondent's violations of Minn. Stat. § 182.653, subd. 8, 29 C.F.R. § 1926.501(b)(13) and (15), and 29 C.F.R. § 1926.503(a)(1) and (2) is AFFIRMED;

(3) That, within 30 days after this Order is issued, the Respondent is ORDERED to pay a total penalty of \$2,100.00 to the Minnesota Department of Labor and Industry at the following address:

Department of Labor and Industry  
Minnesota OSHA Compliance  
443 Lafayette Road N.  
St. Paul, MN 55155

(4) That if the Respondent fails to comply with the terms of this Order:

(a) The Complainant may take action against the Respondent pursuant to the Minnesota Occupational Safety and Health Act of 1973 and may impose other remedies provided by law; and

(b) The Respondent will be liable to the Complainant for any collection fees and interest that the Complainant incurs in attempting to collect the amount due under paragraph 3 of this Order.

Dated: January 29, 2004.

/s/ Barbara L. Neilson

---

BARBARA L. NEILSON  
Administrative Law Judge

---

<sup>[1]</sup> Affidavit of Omar Syed in support of the Complainant's Motion to Dismiss Respondent's Notice of Contest filed on December 31, 2003 (Syed Affidavit), ¶¶ 2-3 and Exhibits A and B attached thereto.

<sup>[2]</sup> Syed Affidavit, ¶ 4 and Exhibit C.

<sup>[3]</sup> Syed Affidavit, ¶ 5 and Exhibits D, E, and F.

<sup>[4]</sup> Syed Affidavit, Ex. D (emphasis in original). The 20-day time period for the filing of an Answer is prescribed both in statute (Minn. Stat. § 182.661, subd. 6) and in rule (Minn. Rules part 5210.0570, subp. 4).

<sup>[5]</sup> Syed Affidavit, ¶ 7 and Exhibits K and L.

<sup>[6]</sup> Syed Affidavit, Exhibit L.

<sup>[7]</sup> Under Minn. Rules part 5210.0570, subp. 5, if an Answer is not filed and served within the prescribed time period, the Administrative Law Judge may, upon motion, enter an Order affirming the contested citation and notification of penalty.

<sup>[8]</sup> Syed Affidavit, ¶ 8 and Exhibit D.

<sup>[9]</sup> See, e.g., *Keefe v. Metro Packaging Corp.*, OSHRB Docket No. 1914 (1985) (copy attached to Syed Affidavit as Exhibit G); *Keefe v. Signcrafters Outdoor Display, Inc.*, OSHRB Docket No. 1975 (1985) (copy attached to Syed Affidavit as Exhibit H); *Keefe v. Weyerhaeuser Co.*, OSHRB Docket No. 2107 (1986) (copy attached to Syed Affidavit as Exhibit I).

<sup>[10]</sup> See, e.g., *Chase v. M & D Stucco & Wall Systems*, OAH Docket No. 6-1901-14794-2 (2002) (copy attached to Syed Affidavit as Exhibit J); *Chase v. Franzen Contracting*, OAH Docket No. 4-1901-14824-2 (2002).